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26 *Plaintiffs EMC Corporation and VMware, Inc.*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

PERSONALWEB TECHNOLOGIES
LLC AND
LEVEL 3 COMMUNICATIONS, LLC.,

Plaintiffs,

v.

EMC CORPORATION AND VMWARE,
INC.

Defendants.

Case No. 5:13-cv-01358-EJD

JOINT CASE MANAGEMENT
STATEMENT

DATE: November 1, 2013

TIME: 10:00 a.m.

PLACE: Ctrm 4, 5th Floor

1 Plaintiff PersonalWeb Technologies, LLC (“PWeb” or “PersonalWeb”) and
 2 Defendants EMC Corporation and VMWare, Inc. (collectively “EMC,” “VMware” or
 3 “Defendants”) submit the following Case Management Statement in advance of the
 4 Court’s November 1, 2013 Case Management Conference.

5 Preliminary Statements

6 *PersonalWeb’s Preliminary Statement:* In December 2011, PersonalWeb filed
 7 six cases for patent infringement in the Eastern District of Texas (“EDTX”), including
 8 the cases against Google/YouTube, EMC/VMware, and NetApp now before this
 9 Court. In 2012, PersonalWeb filed an additional seven cases in the EDTX, including
 10 the case against Facebook (now before this Court).

11 All Defendants in the first six cases moved to transfer to the Northern District
 12 of California. In March 2013, Judge Davis ordered conditional transfer of the
 13 Google/YouTube, EMC/VMware, NetApp, and Facebook cases, and denied transfer
 14 as to the other moving parties. In the order, Judge Davis stated that he would retain
 15 all cases until after the *Markman* claim construction proceedings were completed and
 16 after the Court issued an Order construing disputed claim terms for all cases. In the
 17 meantime, the parties in all cases were directed to continue under the Court’s pretrial
 18 schedule (contained in a common Docket Control Order (Ex. 1)) so that “any delay
 19 resulting from the transfers will be minimized, and the parties should be able to
 20 proceed to trial on a schedule as closely related to their original schedule as possible.”
 21 Order on Transfer, Dkt 103, Case 6:12-cv-00660-LED (March 21, 2013) (Exs. 2).
 22 Judge Davis also indicated that he had spoken with the Chief Judge of the Northern
 23 District of California, and the transferred cases would all be assigned to one
 24 courtroom to minimize the impact of transfer on the parties.

25 On August 5, 2013, Judge Davis issued his *Markman* claim construction order.
 26 Immediately after, Judge Davis issued an order effecting the transfer of these four
 27 cases to the Northern District of California, where all four cases were assigned to this
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1 Court. The remaining eight cases are proceeding in the Eastern District of Texas.

2 PersonalWeb asks that this Court pick up where the cases left off before Judge
3 Davis. Under the EDTX Docket Control Order, fact discovery closes on January 22,
4 2014, expert discovery closes on April 30, 2014, dispositive motions are due May 30,
5 2014, the final pretrial conference is set for October 23, 2014, and trial is set for
6 November 10, 2014.¹

7 Additionally, to avoid delay, PersonalWeb requests that this Court adopt
8 (subject to certain agreed modifications) the protective, discovery and e-discovery
9 orders entered by Judge Davis, and which the parties have been following for over
10 two years. These orders are attached as Exhibits 3, 4, and 5.

11 Finally, PersonalWeb proposes adoption of Judge Davis' *Markman* ruling in
12 the Eastern District of Texas, including any changes Judge Davis may make to his
13 construction as a result of PersonalWeb's limited motion for reconsideration. With
14 the *Markman* now complete, the path is clear for the parties to complete the remainder
15 of fact discovery, engage in expert discovery and prepare for trial.

16 In Defendants' preliminary statement below, EMC and VMware argue that the
17 case should be stayed pending the outcome of *inter partes* reviews pending before the
18 Patent Office. Defendants' arguments are the subject of a pending motion to stay.
19 PersonalWeb has opposed the motion and its grounds for doing so are explained in its
20 opposition papers. Accordingly, PersonalWeb will not respond here to Defendants'
21 re-argument of its motion below unless requested by the Court.²

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24 ¹ EMC requested, and PersonalWeb agreed, to extend the EDTX remaining pretrial
25 dates by 60 days. However, the parties could not agree on a trial date or whether the
26 Court should even set a trial date at this time.

27 ² PersonalWeb, however, does point out that Defendants' falsely contend that
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Defendants' Preliminary Statement: EMC and VMware agree, as a general matter, that the schedule and orders entered in the Eastern District of Texas should be continued in this case, to the extent consistent with this Court's calendar and standing orders. Significant events have occurred, however, since Judge Davis entered his scheduling order. These events warrant a slight modification to the schedule.

In particular, EMC and VMware filed petitions with the PTO on December 14, 2012, requesting *inter partes* review ("IPR") of six of the eight asserted patents.³ The PTO instituted all six IPRs on May 17, 2013, finding a "reasonable likelihood that [Defendants] will prevail in challenging [each of the challenged claims] as unpatentable under 35 U.S.C. §§ 102 and 103."⁴ The PTO has scheduled a final hearing on the IPRs for December 16, 2013, and is statutorily required to issue final

PersonalWeb is a non-practicing entity. In fact, PersonalWeb developed and distributes a product called "StudyPods" that practices claims of the Patents-in-Suit. See www.pweb.com and www.studypods.com.

³ See Dkt 8-8, ('791 IPR) (2013-00082), Petition for IPR; Dkt 8-10, ('280 IPR) (2013-00083), Petition for IPR; Dkt 8-11, ('544 IPR) (2013-00084), Petition for IPR; Dkt 8-12, ('539 IPR) (2013-00085), Petition for IPR; Dkt 8-13, ('662 IPR) (2013-00086), Petition for IPR; Dkt 8-14, ('096 IPR) (2013-00087), Petition for IPR.

EMC and VMware have challenged claims 1-4, 29-33 and 41 of the '791 patent; claims 36 and 28 of the '280 patent; claims 10, 21, and 34 of the '539 patent; claim 1 of the '544 patent; claim 30 of the '662 patent; and claims 1, 2, 81, and 83 of the '096 patent. IPRs on the other two asserted patents (the '310 and '442 patents) have since been filed by Apple and Rackspace. See, e.g., Dkt. 26, Defendants' Unopposed Motion for Administrative Relief Seeking Leave to Supplement the Record on Their Motion to Stay.

⁴ See Dkt 8-15, ('791 IPR), Decision to Institute; see also Dkt 8-16, ('280 IPR), Decision to Institute; Dkt 8-17, ('544 IPR), Decision to Institute; Dkt 8-18, ('539 IPR), Decision to Institute; Dkt 8-19, ('662 IPR), Decision to Institute; Dkt 8-20, ('096 IPR), Decision to Institute.

1 decisions on the IPRs “not later than 1 year” after the petitions were granted – or by
2 May 17, 2014.⁵

3 Given these ongoing IPR proceedings, EMC and VMware have filed a Motion
4 to Stay Pending *Inter Partes* Review (Dkt. 8), requesting that this Court stay this
5 litigation pending the PTO’s final decisions on the IPRs.⁶ This motion has been fully
6 briefed, is ripe for determination, and is scheduled for oral argument on January 10,
7 2014. As further set forth in the motion, Defendants believe that a brief stay of the
8 case is appropriate given the PTO’s institution of the IPRs, and its finding that
9 Defendants have a “reasonable likelihood” of prevailing in challenging all asserted
10 claims of the ‘791, ‘280, ‘544, 539, ‘662, and ‘096 patents. This Court has a liberal
11 policy in favor of granting motions to stay pending the outcome of PTO
12 reexamination proceedings, and the benefits of such a stay in this case would be
13 substantial. Staying the case pending final decisions on the IPRs would undoubtedly
14 simplify the issues in the case, and could eliminate the need for trial on most or all of
15 the issues. Moreover, many of the most costly stages of the litigation have yet to
16 occur – including factual depositions, expert discovery, and summary judgment

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19 ⁵ See 35 U.S.C. § 316(a)(11); Dkt 8-21, (‘791 IPR), Scheduling Order; Dkt 8-22,
20 (‘280 IPR), Scheduling Order; Dkt 8-23, (‘544 IPR), Scheduling Order; Dkt 8-24,
21 (‘539 IPR), Scheduling Order; Dkt 8-25, (‘662 IPR), Scheduling Order; Dkt 8-26,
(‘096 IPR), Scheduling Order.

22 The one-year period may be extended for good cause by not more than 6
23 months, although “[e]xtensions of the one-year period are anticipated to be rare.” 77
Fed. Reg. at 48,695.

24 ⁶ Prior to filing the Motion to Stay in this Court, EMC and VMware filed a Motion for
25 Leave to File a Motion for Stay in the Eastern District of Texas, seeking leave to file
26 its Motion for Stay in this Court pending the transfer. This motion remained pending
27 in the Eastern District of Texas at the time the transfer became effective.

1 motions – each of which could be reduced or eliminated following the PTO’s final
2 decision on the IPRs. Plaintiff PersonalWeb would suffer no undue delay or prejudice
3 from such a stay, given the speed of the PTO’s new IPR procedures. This is
4 particularly true given that PersonalWeb waited more than 7 years to file this lawsuit,
5 and that it does not manufacture any products that practice the patent.

6 The parties agree a slight modification to the schedule entered by the Eastern
7 District of Texas is warranted.⁷ In particular, Defendants’ proposed schedule will
8 permit this Court to rule on Defendants’ Motion to Stay before expert reports in the
9 case become due. Defendants expect that expert reports will be particularly costly in
10 this case because PersonalWeb has accused nine (9) separate EMC and VMware
11 products of infringing thirty (30) separate patent claims. Under Defendants’ proposed
12 schedule, in the event the Court does not grant the requested stay, the schedule would
13 be extended by 60 days so that fact discovery would close on March 21, 2014,
14 opening expert reports would be due on April 14, 2014, and expert discovery would
15 close on June 30, 2014. PersonalWeb has indicated that it does not oppose extending
16 the schedule by 60 days so long as trial is set consistent with that extension.
17 Defendants’ lead counsel has conflicts with the January 13, 2015 trial date proposed
18 by PersonalWeb, but Defendants’ are amenable to setting a trial date in early 2015, at
19 a time convenient to the Court and the parties.

20 The parties have also agreed to adopt the E-discovery Order ((EDTX) Dkt. 80)
21 entered in the Eastern District of Texas. In addition, the parties agree to adopt the
22 Protective Order ((EDTX) Dkt. 79) entered in the Eastern District of Texas, but
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25 ⁷ As noted by PersonalWeb, Defendants and PersonalWeb agreed to extend the
26 remaining EDTX dates by 60 days.
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request that reference to the Eastern District of Texas in “Section 8.H” be replaced with the Northern District of California. Lastly, Defendants are generally amenable to adopting the Discovery Order ((EDTX) Dkt. 97) entered in the Eastern District of Texas, but have proposed two minor changes that are necessary to reflect the transfer of this case to the Northern District of California. (*See infra*, Section 8 “Discovery”.)

1. Jurisdiction and Service:

PersonalWeb contends that this Court has subject matter jurisdiction over PersonalWeb’s claims against Defendants under 28 U.S.C. §§ 1331 and 1338(a). Defendants do not contest personal jurisdiction or venue in this District with regard to PersonalWeb’s claims. All named parties have been served, and there are no unresolved issues relating to service of process.

Defendants contend that this Court has jurisdiction over their counterclaims for declaratory relief pursuant to 28 U.S.C. §§ 1331, 1338, and 2201. PersonalWeb agrees that, for purposes of Defendants’ counterclaims, this Court has personal jurisdiction over PersonalWeb and that venue is proper in this District. All named parties have been served, and there are no unresolved issues relating to service of process.

2. Facts:

PersonalWeb’s Statement: PersonalWeb’s asserted patents claim inventions directed to various methods of identifying data (such as files or portions of files) to improve the speed and efficiency of accessing data, increase effective storage capacity of data, and reduce bandwidth needs in transferring data. The patents’ inventors recognized that in a world of rapidly expanding and globally distributed data and networks, it would be important to have more efficient and reliable ways of identifying data for accessing, storing, and transferring data. Their solution involved identifying data in the system in a manner that is independent of subjective names (such as user-given file names, file locations, or other metadata) and instead is based

1 on the data itself. That way, data could be identified across multiple, complex
2 networks and file systems, independent of different naming practices.

3 PersonalWeb, a limited liability company with its principal place of business in
4 Tyler, Texas, holds an undivided ownership interest in the Patents-in-Suit (U.S. Patent
5 Nos. 5,978,791, 6,415,280, 6,928,442, 7,802,310, 7,945,539, 7,945,544, 7,949,662,
6 and 8,001,096). PersonalWeb filed this action in December 2011 alleging patent
7 infringement by EMC based on five EMC products (EMC Centera, EMC Data
8 Domain, EMC Avamar, EMC Atmos CAS, and EMC Isilon) and three VMWare
9 products (vSphere, VMware Data Recovery, and vSphere Storage Appliance).

10 *Defendants' Statement:* PersonalWeb's asserted patents are directed to data
11 storage systems that use "substantially unique identifiers" – based on the content of
12 the data in a data item – to identify data items for file management functions. *See,*
13 *e.g.,* Ex. 1, '791 patent, Title, Abstract, and col. 1, ll. 13-18. These techniques were
14 old and widely used.

15 Furthermore, on October 25, 2004, Kinetech, Inc., the original assignee of the
16 asserted patents, wrote a letter to EMC accusing it of infringing the '791 and '280
17 patents, and offering it a license. *See* (EDTX) Dkt. 13, Defendants' Motion to
18 Transfer Venue, at 13 n.18; (EDTX) Dkt. 13-33, Lyons Decl. ¶¶ 13-14. At the time
19 Kinetech sent this letter, the '791 and '280 patents were the only asserted patents to
20 have issued. EMC responded in a letter dated February 8, 2005, advising Kinetech
21 that it was not infringing the patents, and explaining why. *Id.*

22 After this correspondence, EMC considered the matter closed. More than five
23 years later, however, Kinetech's parent company, Brilliant, set out to assert the
24 patents against the storage and cloud computing industry in the Eastern District of
25 Texas, and formed a new company, PersonalWeb, Inc., in Tyler, Texas. PersonalWeb
26 subsequently filed this lawsuit in the Eastern District of Texas, alleging that a long list
27 of separate EMC and VMware products infringe the asserted patents. Moreover, it
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1 claimed to own all rights and interest in the patents even though various rights had
 2 been assigned to and/or licensed to other entities (*i.e.* Level 3 Communications LLC
 3 (“Level 3”) owns a fifty percent (50%) interest in the patents and rights to an
 4 exclusive field of use.) *See, e.g.*, Dkt. 19, Amended Complaint. Moreover, all of the
 5 products that PersonalWeb has accused of infringement fall outside the scope of the
 6 asserted patent claims.

7 3. Legal Issues:

8 The legal issues in dispute are identified in PersonalWeb’s First Amended
 9 Complaint ((EDTX) Dkt. 19) and Defendants’ First Amended Answer, Defenses and
 10 Counterclaims ((EDTX) Dkt. 110). The allegations, affirmative defenses, and
 11 counterclaims include the following issues:

- 12 (a) The proper construction of the asserted claims of the patents-in-suit;
- 13 (b) Whether the accused products infringe the patents-in-suit;
- 14 (c) Whether PersonalWeb’s patents-in-suit are valid;
- 15 (d) Whether PersonalWeb’s patents-in-suit are enforceable;
- 16 (e) Whether PersonalWeb’s claims are barred or limited by laches;
- 17 (f) Whether PersonalWeb’s claims are barred or limited by waiver;
- 18 (g) Whether PersonalWeb’s claims are barred or limited by estoppel and/or
equitable estoppel;
- 19 (h) Whether PersonalWeb’s claims are barred or limited by unclean hands;
- 20 (i) Whether PersonalWeb’s claims are barred or limited by exhaustion,
implied license, actual license, and/or restrictions on double recovery;
- 21 (j) Whether PersonalWeb’s claims are barred or limited by Plaintiffs’ lack
of standing;
- 22 (k) Whether Defendants’ infringement, if any, was willful;
- 23 (l) The amount of damages, if any, due to PersonalWeb for Defendants’
alleged infringement;
- 24 (m) Whether PersonalWeb is entitled to enhanced damages pursuant to 35
U.S.C. § 284;
- 25 (n) Whether PersonalWeb is entitled to an order enjoining Defendants from
26 further infringing PersonalWeb’s patents, and the terms of such

injunctive relief;

- (o) Whether declaratory judgment that the patents-in-suit are invalid and unenforceable is appropriate;
- (p) Whether declaratory judgment that the patents-in-suit have not been infringed by Defendants is appropriate;
- (q) Whether declaratory judgment that PersonalWeb and Level 3 have waived and are estopped from obtaining any relief from Defendants on their purported claims is appropriate; and
- (r) Whether this is an exceptional case, such that PersonalWeb or Defendants are entitled to their costs (including expert fees), disbursements, and reasonable attorneys' fees incurred in this action.

4. Motions:

Plaintiff PersonalWeb's Motions:

- (a) PersonalWeb has pending before Judge Davis a motion for partial reconsideration of the Court's *Markman* ruling as to a limited aspect of two claim terms. Briefing on that motion is complete.
- (b) Defendants respond that this motion has been filed in PersonalWeb's cases against other defendants, but not in this case. Defendants accordingly have had no opportunity to respond to PersonalWeb's motion.

Defendants Motions:

- (a) Defendants' Motion to Stay Pending *Inter Partes* Review (Dkt. 8) is currently pending before this Court. The motion is fully briefed and ripe for determination.

5. Amendment of Pleadings:

The parties do not contemplate further amendment to the pleadings.

6. Evidence Preservation:

The parties have reviewed the Guidelines Relating to the Discovery of Electronically Stored Information ("ESI Guidelines"). The parties have met and conferred pursuant to Fed. R. Civ. P. 26(f) regarding reasonable and proportionate steps taken to preserve evidence relevant to the issues reasonably evident in this action.

1 *PersonalWeb's Position:* PersonalWeb has taken steps to preserve relevant
 2 evidence, including the issuance of a document retention notice to individuals and
 3 document custodians reasonably likely to have information subject to discovery in
 4 this litigation.

5 *Defendants' Position:* Defendants have each taken steps to preserve relevant
 6 evidence, including the issuance of document retention notices to individuals and
 7 document custodians reasonably likely to have information subject to discovery in
 8 this litigation.

9 7. Disclosures:

10 The parties have exchanged initial disclosures pursuant to Fed. R. Civ. P. 26.

11 8. Discovery:

12 *Joint Statement:* The parties agree to adopt the E-discovery Order (E.D.Tex.
 13 Dkt. 80) entered in the Eastern District of Texas. In addition, the parties agree to
 14 adopt the Protective Order ((EDTX) Dkt. 79) entered in the Eastern District of Texas,
 15 but request that reference to the Eastern District of Texas in "Section 8.H" be replaced
 16 with the Northern District of California. The modified section would state (in
 17 relevant part):

18 "8.H. The United States District Court for the ***Northern District of***
 19 ***California*** is responsible for the interpretation and enforcement of this
 20 Agreed Protective Order. ... All disputes concerning Protected
 21 Information produced under the protection of this Agreed Protective
 22 Order shall be resolved by the United States District Court for the
 23 ***Northern District of California.***"

24 The parties do not agree on a proposed Discovery Order.

25 *PersonalWeb's Statement:* PersonalWeb has completed substantial discovery,
 26 including the production of all its documents, and the review of source code for the
 27 accused products. Based on this review, PersonalWeb has provided detailed claim
 28 charts to Defendants, explaining how features of the accused products read on each
 limitation of the asserted claims and containing citations to the relevant source code

1 routines. Both parties also have responded to interrogatories.

2 Now that the Court has entered a claim construction order, PersonalWeb
3 intends to conduct focused depositions and pursue focused email discovery from
4 EMC in accordance with the procedures contained in the e-Discovery Order.
5 PersonalWeb has noticed the depositions of Defendants and expects to complete fact
6 discovery within the agreed March 21, 2014 deadline.

7 As stated above, the parties agree on the entry of the Protective Order (subject
8 to the change to paragraph 8(H) and e-Discovery Order.

9 PersonalWeb asked that this Court adopt the EDTX Discovery Order.
10 PersonalWeb agrees with Defendants that paragraphs 8, 11, 12, 14, and 15 should be
11 deleted, and that the parties should follow the NDCA local rules in place of these
12 provisions. As for the common discovery limits set forth in paragraph 4,
13 PersonalWeb believes that Defendants should continue to coordinate with Defendants
14 remaining in the EDTX so that PersonalWeb and third parties are not required to
15 respond to identical written discovery requests from different parties, and witnesses
16 are not subjected to repeated depositions on the same matters by different parties.
17 This coordination worked well when all parties were in the EDTX, and there is no
18 reason that it cannot continue now that the cases are divided between two
19 jurisdictions.

20 *Defendants' Statement:* The parties have made only minimal progress in
21 discovery, and the most time-consuming and costly stages of this litigation have yet to
22 occur. The parties have not yet negotiated email search terms or custodians. No
23 factual depositions have been noticed or taken on issues other than venue transfer. No
24 expert reports have been exchanged, and no expert depositions have been noticed or
25 taken. No summary judgment motions have been filed.

26 Defendants are generally amenable to adopting the Discovery Order ((EDTX)
27 Dkt. 97) entered in the Eastern District of Texas, but request two changes that are
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1 necessary to reflect the transfer of this case to the Northern District of California. The
2 proposed changes are detailed below.

3 First, Defendants request clarification that the common discovery limits in
4 paragraph 4(A) of the Discovery Order either will not apply, or will apply to only
5 those “Defendant Groups” in the Northern District of California.

6 Second, Defendants request that the Court strike paragraphs 8, 11, 12, 14 and
7 15, which pertain to procedural requirements that are specific to the Eastern District
8 of Texas. Defendants propose that the parties follow the Local Rules, Standing
9 Orders and other guidelines of this Court and Judge Davila on these and any other
10 procedural issues. PersonalWeb agrees to delete these paragraphs.

11 Provided that the Court grants Defendants’ requests, Defendants shall submit
12 an amended Discovery Order, reflecting these changes.

13 9. Class Actions:

14 These cases are not a class action.

15 10. Related Cases:

16 The following related cases are pending before this Court: *PersonalWeb v.*
17 *Facebook*, 5:13-cv-01356-EJD; *PersonalWeb v. Google and YouTube*, 5:13-cv-01317
18 EJD; and, *PersonalWeb v. NetApp*, 5:13-cv-01359-EJD.

19 11. Relief:

20 *PersonalWeb’s Statement:* PersonalWeb intends to seek damages in the form
21 of a reasonable royalty for EMC’s infringement of its patents. PersonalWeb is
22 conducting discovery necessary for its experts to opine on the appropriate reasonable
23 royalty in this case.

24 *Defendants’ Statement:* Defendants’ Answer includes counterclaims for
25 declaratory judgment of non-infringement and invalidity of PersonalWeb’s asserted
26 patents. Defendants seek an award of reasonable attorney’s fees, costs, and expenses,
27 and any other relief as the Court may deem just and proper.

12. Settlement and ADR:

The parties have not engaged in settlement discussions. PersonalWeb and Defendants are amenable to private mediation LR 3-4 (b).

13. Consent to Magistrate Judge For All Purposes:

The parties do not consent to have this case proceed for all purposes before a Magistrate judge.

14. Other References:

The parties do not believe this case is suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation at this time. The parties reserve their right to request such reference in the future.

15. Narrowing of Issues:

The parties have not identified any such issues at this time.

16. Expedited Trial Procedure:

This is not the type of case that can be handled under the Expedited Trial Procedure of General Order 64, Attachment A.

17. Scheduling:

PersonalWeb's Position: PersonalWeb asks that this Court follow the EDTX schedule as set forth in the Docket Control Order, continuing where the cases left off before Judge Davis. Under the EDTX Docket Control Order, fact discovery closes on January 22, 2014, expert discovery closes on April 30, 2014, dispositive motions are due May 30, 2014, the final pretrial conference is set for October 23, 2014, and trial is set for November 10, 2014. PersonalWeb does not oppose a 60-day extension of those dates so long as trial is set consistent with that extension -- *i.e.*, on January 13, 2015, or the first date thereafter available to the Court.

Defendants' Position: Defendants' proposed schedule will permit this Court to rule on Defendants' Motion to Stay before expert reports in the case become due. Defendants expect that expert reports will be particularly costly in this case because

PersonalWeb has accused nine (9) separate EMC and VMware products of infringing thirty (30) separate patent claims. Under Defendants' proposed schedule, in the event the Court does not grant the requested stay, the schedule would be extended by 60 days so that fact discovery would close on March 21, 2014, opening expert reports would be due on April 14, 2014, and expert discovery would close on June 30, 2014. For the convenience of the Court, a copy of the Defendants' proposed schedule is attached hereto as Exhibit 6. Defendants' lead counsel has conflicts with the January 13, 2015 trial date proposed by PersonalWeb, but Defendants' are amenable to setting a trial date in early 2015, at a time convenient to the Court and the parties.

18. Trial:

A jury demand has been made on all issues so triable. The parties estimate that the expected length of trial will be ten (10) days.

19. Disclosure of Non-party Interested Entities or Persons:

PersonalWeb's Position: PersonalWeb has filed the Certificate of Interested Entities or Persons required by Civil L.R. 3-16. PersonalWeb has no parent corporation and no publicly held company owns more than 10% of PersonalWeb's stock.

Defendants' Position: Defendants have filed the Certificate of Interested Entities or Persons required by Civil L.R. 3-16. Defendant EMC has no parent corporation and no publicly held company owns more than 10% of Defendant EMC's stock. Other than the named party Defendant EMC, there is no such interest to report for Defendant VMware. Defendant EMC owns more than 10% of VMware's stock and is the parent corporation to Defendant VMware.

Defendants have concerns that PersonalWeb's Certificate of Interested Entities or Persons fails to disclose entities known by PersonalWeb to have a financial interest in PersonalWeb and/or an interest in the outcome of this case. PersonalWeb has indicated to this Court that "other than the named parties, there is no such interest to

report.” (Dkt. 13). Yet, in its Sur-Reply to Defendants’ Motion to Transfer Venue, PersonalWeb represented to the Eastern District of Texas that the prior owner of the patents – Kintech, Inc. – is an equity investor in PersonalWeb (along with four other entities):

“EMC’s argument that companies previously owning the True Names patents are ‘funding this litigation’ is incorrect. Kinetech, the prior owner, is an equity investor in PersonalWeb along with four other entities. As a start up company, PersonalWeb has received loans from four separate secured creditors. Because PersonalWeb launched its first product only recently, these equity and debt investments have funded the entire company and all product development, not just ‘this litigation.’”

((EDTX) Dkt. 31, at 2) (internal citations omitted).

20. Other:

(a) *Post-Markman Issues*

PersonalWeb’s Position: On July 18, 2013, Judge Davis conducted a Markman hearing and issued a claim construction order on August 5, 2013. PersonalWeb has sought limited reconsideration before Judge Davis of the Court’s claim construction as two terms. The briefing on this issue is complete as of September 27, 2013. PersonalWeb does not intend to certify for immediate appeal to the Federal Circuit the claim construction ruling.

The parties continue to engage in fact discovery and are preparing to move forward with expert discovery in this case. While fact discovery remains to be completed, and expert discovery has not yet begun, PersonalWeb has invested considerable resources in discovery and its experts and consultants. Defendants’ progress may be “minimal,” but PersonalWeb’s investment and progress in this matter has been substantial.

Defendants’ Position: PersonalWeb filed its motion for partial reconsideration before Judge Davis *after* this case was already transferred to the Northern District of California. Moreover, it submitted the motion only in its cases against the other

1 defendants, and did not file a motion for reconsideration in this case. Defendants
2 accordingly have had no opportunity to respond to PersonalWeb's motion and would
3 therefore be prejudiced by a reconsideration of the ruling in its absence.

4 As referenced above in Section 8 "Discovery", the parties have made only
5 minimal progress in discovery, and the most time-consuming and costly stages of this
6 litigation have yet to occur.

7 (b) *Service of Documents*

8 The parties agree that service by electronic mail, with delivery of lengthy
9 exhibits by overnight delivery (e.g. Federal Express) or by posting the document on
10 an FTP site [with concurrent notice to opposing counsel and instructions on how to
11 access the site], will be considered "actual delivery" under Civil L.R. 5-5(a)(1) on that
12 day that the documents are emailed and delivered to the courier for overnight mail or
13 posted on an FTP site. This agreement is not intended to change the deadlines under
14 the Northern District of California's Local Rules for responding to filings submitted
15 via the Court's ECF system.

1 DATED: October 25, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on October 25, 2013 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system. Any other counsel of record will be served by electronic mail, facsimile, U.S. Mail and/or overnight delivery.

/s/ Lawrence M. Hadley